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18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422,
18-2650, 18-2651, 18-2661, 18-2724, and 19-1385

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

*On Appeal from Orders of the United States District Court
for the Eastern District of Pennsylvania (Hon. Anita B. Brody),
No. 1:14-md-02323-AB and MDL No. 2323*

**BRIEF OF FEDERAL PROCEDURE AND CLASS ACTION
SCHOLARS AS AMICUS CURIAE
SUPPORTING THE FANCA OBJECTORS**

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CORPORATE DISCLOSURE STATEMENT

All amici are individuals.

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STATEMENT OF INTEREST¹

Amici, listed in the attached addendum, are leading scholars with decades of experience in federal civil procedure and class actions. Amici therefore have a strong interest in the sound development of class-action law. They write to explain how the benefits of collective actions depend upon actively encouraging objections from class members, which in turn requires providing reasonable compensation to their counsel—something the district court’s fee award to the *Faneca* objectors in this case does not do.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“[V]illians.”² “[P]ond scum,” “bottom feeders,” “warts on the class action process.”³ These are the pejoratives hurled at class-action objectors and the attorneys who represent them—an unfairly deserved consequence of abuses by a few “strategic objectors” who have developed a “cottage industry” of

¹ No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel contributed money to fund the brief’s preparation or submission. The parties have consented to the filing of this brief.

² William Rubenstein, Alba Conte & Herbert B. Newberg, 4 NEWBERG ON CLASS ACTIONS 1320 (5th ed. 2018).

³ Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 407, 411 (2003).

(Continued . . .)

raising “pointless objections” to class-action settlements,⁴ simply to “‘hold up’ [the] settlements” and “enrich” themselves “‘by appealing unless they are paid to disappear.’”⁵ These extortionists have made the objector *persona non grata* in courtrooms across the country; as welcome, as one scholar put it, as one who stands to object during someone else’s wedding.⁶ This attitude has led district courts to view objectors with a jaundiced eye, providing them little or no compensation regardless of their compensation to class-action settlements.

But appellate courts around the country—including this Court—have recognized the fault in this approach. Appellate courts recognize that not all objectors are unwelcome disruptors at the wedding; after all, they are the bride and groom, the very members of the class whose rights are being permanently adjudicated in the settlement approval process. It is their rights that the process should be protecting. And as the *Faneca* objectors’ invaluable contribution to this case amply illustrates, objectors are critical in providing

⁴ David Lyons, *Flight Attendants’ Lawyers Object to Settlement*, Miami Herald 1B (June 29, 1998) (quoting Professor John Banzhaf III).

⁵ Civil Rules Advisory Committee, Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee* 223 (Admin. Office of the U.S. Courts, May 20, 2002) (quoting Professor Charles Silver).

⁶ Lawrence W. Schonbrun, *The Class Action Con Game*, 20 Regulation 53 (Fall 1997).

that protection, uncovering troublesome aspects of settlements that the parties seeking approval of those settlements would rather see hidden. Objectors thus ensure that class-action settlements benefit class members, not simply the lawyers seeking fees and the defendants seeking to buy peace. Simply put, objectors keep the process honest.

Appellate courts also understand that while “professional objectors” are a very real problem, their threat is vastly overstated. And objector campaigns are at their best when they *are* run by those with an entrepreneurial stake in the litigation. Lay objectors rarely know whether they have any information that would be valuable to the class. Converting their raw intelligence into changes in the settlement often requires top-level legal acumen, and a significant outlay of expenses. Objectors therefore need counsel, and their counsel must be adequately compensated for their service to the class, to ensure that objections will be incentivized: that those with the resources and know-how to mount a meaningful objector campaign can have some assurance at the outset that their investment will be worthwhile.

Ensuring adequate compensation for objectors’ counsel raises no risk of encouraging extortionate objectors, who count on private payoffs from the settling parties precisely because they know they cannot demonstrate a

contribution to the class worthy of a fee. But keeping those incentives in view will ensure that quality lawyers will continue to make the significant investments necessary to make substantive objections. Otherwise, they will not take the gamble, and class members will be the poorer for it.

Because the district court's fee award falls short of these standards, it should be overturned.

ARGUMENT

THE COURT SHOULD ENSURE THAT OBJECTORS ARE PROPERLY INCENTIVIZED TO MAINTAIN A FAIR AND EFFICIENT CLASS-ACTION SYSTEM.

The district court's fee award to the *Faneca* objectors in this case fell below what the law requires, and what the law should incentivize, in fee awards to objector counsel.

A. Active objector participation is a vital component of a functioning class-action system.

While class actions have the capacity to provide enormous societal good that makes them a worthwhile supplement to conventional litigation, the class action device's usefulness is hampered by the widely documented abuses of the system. See Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 731–33 (2013); see also Martin H. Redish, WHOLESALÉ JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION

LAWSUIT 1–2 (2009); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3–4 (1991); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 627 (1987) (“*Rethinking the Class Action*”). Many of these abuses stem from a single source—agency: Virtually all class actions end in settlements, see Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 4 J. of Empirical Legal Studies 811, 819 (2010), and class members have virtually no control over those bargaining on their behalf.

The class’s leaders, “the representative parties,” “simply cannot efficiently monitor their attorneys—class counsel.” *Rethinking the Class Action* 629. Nor do the representative parties—or any other class members—have much incentive to do that monitoring. “When each plaintiff’s stake in the outcome is litigation is small, no plaintiff has an appreciable incentive to monitor the conduct of class counsel.” John E. Lopatka, D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them*, 39 Fla. St. U. L. Rev. 865, 867 (2012). And class representatives receive only marginal compensation beyond that provided to the other members of the class.

Instead, “[c]lass actions are the brainchildren of the lawyers who specialize in prosecuting such actions,” *Eubank v. Pella Corp.*, 753 F.3d 718, 719–20 (7th Cir. 2014), meaning it is class *counsel’s* priorities, not class *members’*, that often drive settlements. And while there are many cases where class counsel do keep class members’ interests at heart, that is not always the case. Class counsel sometimes fail to thoroughly investigate the defendant’s wrongdoing or the full extent of class-members’ injuries, especially when the possibility of negotiating a quick, cursory settlement presents itself. And because class counsel feel a natural imperative to get paid, the “unscrupulous” among them negotiate settlements that provide little benefit to the class members themselves, with the lion’s share going toward attorney’s fees. Marcel Cahan & Linda Silberan, *Matushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 S. Ct. Rev. 219, 232 (1996). Thus, the entrepreneurial incentives that make class actions so effective sometimes put counsel at odds with their clients’ best interests.

Class-action defendants are not much of a check on this problem. Their natural concern is “buying peace”—disposing of the greatest possible swath of potential claims for the least possible cost. *In re Pet Foods Prods. Liab. Litig.*, 629 F.3d 333, 359 (3d Cir. 2010) (Weis, J., concurring in part and dissenting in

part). Defendants therefore care a great deal about what they have to pay, but pay little heed to where the funds go, so “the allocation between the class payment and the attorneys’ fees is of little or no interest to the defense.” *In re Gen. Motors Corp. Pick-up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995) (internal quotation omitted). Defendants thus often serve as accelerants to abusive settlements. If defendants are lucky enough to be presented with an offer that results from inadequate investigation and provides little real value to the class, they have every reason “accept such a settlement to end the litigation,” even if it means overcompensating class counsel. Lopatka *et al.* 867.

The district court should be “vigilan[tly]” looking for these sorts of abuses in scrutinizing proposed settlements for approval under Fed. R. Civ. P. 23(e). *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002). Yet numerous factors make it impractical to depend solely on district courts. For one thing, district courts have no real scale by which to measure the reasonableness of settlement terms, because “reasonableness is not a precise term with respect either to merits or to fees.” Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 443 (1996). For another, district

courts' review is hampered by the fact that, to courts, settlements are largely a "black box." The parties negotiate in private and decide what evidence to present to the court in the approval process, with little reason to offer up warts that would undo their hard work. Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. Rev. 1257, 1272 (1985). The district court has little capacity to uncover these warts on its own. *See* Brunet 406; Alon Klemet, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 Rev. Lit. 25, 44-51 (2002). Crushing workloads give district judges an "overwhelming incentive to clear their docket," Samuel Issacharoff, *Class Action Conflicts*, 20 U.C. Davis L. Rev. 805, 829 (1997), the governing axiom being "a bad settlement is almost always better than a good trial." *In re Warner Comm'ns. Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

As a result, the empirical evidence suggests that "judicial monitoring of class action settlements" is "relatively slack," John Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714 n.121 (1986) ("*Understanding the Plaintiff's Attorney*"). And the settlement-approval process often devolves into a "staged performance," *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996)

(Easterbrook, J., dissenting from denial of rehearing en banc)—a “bargain proffered for [the district court’s] approval without benefit of adversarial investigation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

It thus falls to objectors to check class-action abuses. Only they can overcome the core agency problem by stepping up to advocate for themselves and filling in the informational void of the settlement “black box”—a power that is all the more meaningful because, unlike the court, objectors can conduct their own discovery. See Fed. R. Civ. P. 23(h) (Advisory Committee Note) (noting that the “court may allow objector discovery relevant to objections”). Objectors might demand that the parties produce more evidence on liability, therefore ensuring that the settlement hearing actually contains an “adversarial presentation of the evidence.” *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009). They may also provide data about the settlement’s reasonableness simply through their choice whether to object at all. Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vanderbilt L. Rev. 1529, 1541 (2004). Often, objectors also uncover troublesome aspects of the settlement that the settling parties would rather keep hidden or simply overlooked.

This has led to many well-documented instances in which objectors have singlehandedly forced changes to settlements to ensure that underserved interests in the class were protected. They have corrected failures to account for such basic factors as inflation or cost-of-living adjustments. *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 620 (3d Cir. 1996), *aff'd sub nom. Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). They have also uncovered more substantive problems: settlements that left certain subclasses underserved, or provided no real benefits to the class at all.⁷

Objectors also serve a vital role in holding district courts' feet to the fire—demanding that the court gives “the issues of the settlement’s adequacy

⁷ *Allen v. Similasan Corp.*, 318 F.R.D. 423 (S.D. Cal. 2016) (rejecting settlement on the basis of objectors’ argument in a case in which the action was brought ostensibly for “disgorgement,” but “only the named Plaintiffs and Attorneys [would get] any money”); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 171 (3d Cir. 2014) (adopting objectors’ argument that difficulties in determining a class settlement’s subclass payouts, plus the settlement’s cy pres provision, meant that class members would likely receive only one-third of the original estimated settlement); *In re General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig.*, 846 F. Supp. 330, 340 (E.D. Pa. 1993), *rev’d*, 55 F.3d 768 (3d Cir.) (adopting objectors’ argument that coupon settlement requiring coupons to be redeemed within 15 months should be rejected because it provided little benefit to fleet owners, for whom it was economically unfeasible to turn over the entire fleet within the redemption period).

(Continued . . .)

the care it deserve[s],” thereby ensuring the settlement hearing is more than a machine-like rubber stamping. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010)⁸ In short, objectors “have played a crucial role in keeping all the players honest”—class counsel, defendants, and district courts alike. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 Val. U. L. Rev. 413, 440-41 (1999).

Indeed, the *Faneca* objectors in this case epitomize the benefits that objectors can provide in class settlements—especially when their counsel have a direct stake in making positive changes in the settlement. As the *Faneca* objectors have themselves explained on appeal, they produced extensive medical evidence of how CTE could be diagnosed before death, to support changes in the threshold necessary for recovery. *Faneca* Objectors’ Br. 55-56.

⁸ See, e.g., *In re Bluetooth Headset Prod. Liab. Litig.*, No. CV07ML1822DSFEX, 2009 WL 10680029, at *4 (C.D. Cal. Oct. 22, 2009) (awarding counsel \$850,000), *vacated*, 654 F.3d 935 (9th Cir. 2011) & *In re Bluetooth Headset Prod. Liab. Litig.*, No. 07-ML-1822 DSF EX, 2012 WL 6869641, at *10 (C.D. Cal. July 31, 2012) (reducing counsel’s fee award by 75% as it was the result of a sweetheart collusive deal); *Eubank v. Pella*, 753 F.3d 718, 728 (7th Cir. 2014) (overturning settlement based on objectors’ argument that the district court had approved despite possessing “almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for”).

And they advocated for changes to the settlement structure that added more than \$100 million to the settlement's overall value. JA7777-JA7784. Indeed, the work that the *Faneca* objectors' counsel performed earned specific praise from the district court—and even from class counsel themselves. JA55-JA56.

Such stories are exactly why numerous appellate courts have resisted the narrative that objector involvement means little beyond extortionism. On the contrary, courts have lavished praise on objectors. Judge Posner called them “good Samaritans,” “professionals [who] render valuable albeit not bargained-for services in circumstances in which high transaction costs prevent negotiation and voluntary agreement.” *Reynolds*, 288 F3d at 288 (citing Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985)). Judges on this Court have mirrored this view, concluding that “objectors play an important role by giving courts access to information on the settlement's merits” that the settling parties might be unable or unwilling to provide. *Bell Atlantic Corp. v. Bolger*, 2 F3d 1304, 1310 (3d Cir 1993). Judge Rosenn expressed special praise for entrepreneurial objectors, asserting that they “not only render[] a service to the class, but aid[] the court” because “he or she raises challenges free from the burden of conflicting baggage that Class Counsel carries.” *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent*

Actions, 278 F.3d 175, 202 (3d Cir. 2002) (Rosenn, J., concurring and dissenting). Accordingly, appellate courts recognize that professional objectors are key to ensuring the procedural fairness of class-action settlements. They encourage them. They do not discourage them.

B. Yet district courts systematically undercompensate objectors' counsel, thereby diminishing objector participation.

Just as objector participation is key in ensuring fairness in class-action settlements, objectors' counsel is critical in obtaining that active objector participation. The actual class members who might object “usually have limited time and resources and limited access to the relevant facts.” Theodore Eisenberg *et al.*, *Attorney's Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 938 (2017). And the low stakes of many potential objectors' claims give them little incentive to step forward, even when their objections, if raised, could provide the court with information that would meaningfully impact the class as a whole.

Objectors need counsel to help them, to help determine the best objections, develop them through investigation and discovery, and bring them to the court's attention in meaningful ways. That often requires top-level legal acumen, a significant outlay of expenses, and significant risk. Encouraging attorneys to represent objectors in a meaningful way thus requires treating

them as the “risk-taking entrepreneur[s]” that they are. *Understanding the Plaintiffs’ Attorney* 714. If objectors’ counsel can cover their costs and make money by providing value, it creates incentive for them to participate and provide that value. But “[i]f fees are too low, counsel will not receive fair compensation for their services to the class. Worse yet . . . qualified counsel will not bring these cases in the first place.” Eisenberg 429. That is true for class counsel. And it is also true of objectors’ counsel—the class counsel’s natural counterweight.

Thus, district courts determining whether to award fees to objectors’ counsel should not only ensure that the award compensates counsel both for the risk undertaken with the representation, but the award must also demonstrate to future litigants in future cases that undertaking an objector campaign will be worth their while—to unlock their entrepreneurial spirit.

Yet district courts tend to do the opposite. They have a demonstrated tendency to under compensate objectors, especially compared to class counsel.⁹ Accordingly, for objectors, “[t]he odds of actually getting a fee” at *all*

⁹ See, e.g., *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176-77 (D. Mass. 1998) (awarding class attorneys approximately \$16.5 million and objector’s attorney approximately \$59,000); *In re Horizon/CMS Healthcare Corp. Sec. Litig.*, 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998) (awarding (Continued . . .)

are not very good—and the fees awarded provide little meaningful incentive. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1448-49 (2006). The reasons for this under-compensation may stem from a variety of sources. It might be fear of blowing up the settlement at the last minute. It might be that district courts generally regard the process of awarding fees as a nuisance and do not give it much attention. But a big part of this problem is that many district courts have bought into the narrative that objectors tend to be extortionate professional objectors rather than positive contributors and incentivizing him will only increase the extortion.

This fear bears little relation to reality, because most objectors are not extortionists. Extortionate objectors make their money by raising (or threatening) frivolous appeals, but the data from appeals show that most objector appeals are *not* frivolous. On the contrary, objectors enjoy a better rate of success on appeal than the average appellant in the federal system. See

class attorneys approximately \$4.2 million and objector's attorneys approximately \$79,000); *Feinberg v. Hibernia Corp.*, 966 F. Supp. 442, 454-55 (E.D. La. 1997) (awarding class attorneys approximately \$4.5 million and objector's attorney approximately \$50,000); *Petruzzi's, Inc. v. Darling-Del. Co.*, 983 F. Supp. 595, 621-22 (M.D. Pa. 1996) (awarding class attorneys approximately \$2.5 million and objector's attorney approximately \$11,000).

Br. of Amicus Curiae Council of Institutional Investors in Support of Petitioner, *Devlin v. Scardelletti*, No 01- 417, 2001 US Briefs 417, at *18 (noting that of forty-four appeals by objectors between 1971-2000, 32 percent resulted in reversals, compared to overall reversal rate for federal civil appeals in 2000 of 12 percent). The trouble indeed may be that objectors may not participate *enough*. Empirical evidence suggests only one out of two class-action settlements draws even one objector. Eisenberg & Miller 1541 (reporting in a survey that only half of settlement hearings had even one objection). There is thus no epidemic of extortionate objectors routinely standing in the way of settlements. And when objectors do participate, they tend to participate in a positive way.

C. Appellate courts therefore appropriately take an active role in overcoming district courts’ anti-objector bias and ensuring adequate compensation for objectors’ counsel.

Appellate courts have recognized a need to step into reverse the district courts’ anti-objector trend. While fee awards are largely a matter within the district court’s discretion, appellate courts, including this Court, routinely step in to ensure that objectors’ counsel are given proper compensation for the “valuable and important role” they play in preventing collusive settlements. *See, e.g., In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 744 (3d Cir. 2001).

Indeed, in many cases, some cases, courts have gone so far as to step in and fashion the award themselves to ensure its adequacy. *E.g.*, *Green v. Transitron Elec. Corp.*, 326 F.2d 492, 499 (1st Cir. 1964).

In many cases, determining the appropriate level of that compensation may be hard, requiring the weighing of competing alternatives, and in such cases substantial deference should be afforded to the district courts' balancing. But not so in this case—where the objectors went to great pains to show how their contribution had a direct monetary effect on the case. JA7777-JA7784. When such detailed information is provided by objectors' counsel and goes unrebutted by the other side, district courts should not be free to simply discard it. That would send a terrible signal to future litigants: that even the most tangible of benefits provided to the class will provide no guaranty of a commensurately valuable fee recovery. And that would give any attorney pause before considering mounting an objector campaign.

Thus, the district court fell short in awarding the *Faneca* counsel only \$350,000 for more than 6,500 billable hours and \$50,000 in expenses they put into the case—an effective billing rate of only \$50 per hour. That gave them only a fraction of what the district court awarded to class counsel (JA6555-JA6556), and a fraction of what these sophisticated attorneys garner on the

open market, and bore no relation to the tremendous value they provided to the class. That will not serve to encourage these types of experienced and sophisticated attorneys, who can profitably spend their time elsewhere, to add value in future class actions.

Providing adequate compensation to objectors raises no risk of incentivizing professional objectors. This is because district courts can easily distinguish between the extortionate objectors and entrepreneurial ones. The investment of time and resources that entrepreneurial objectors put into raising objections that actually make a difference is obvious to any court. Extortionate settlement tactics are equally obvious, usually involving duplicative or frivolous objections. Extortionate objectors therefore already know they cannot hide, which is why their strategy is to focus on extracting a fee from the settling parties. Extortionate objectors will not even seek fees—or will do so knowing that their fee requests are likely to be rejected. Thus, compensating objectors for valuable contributions is likely only to encourage proper objections, not improper ones. If anything, ensuring the promise of getting compensation might make some extortionists change their ways and attempt instead to contribute something. Accordingly, requiring that district courts to provide fee awards keyed to actual performance, and the incentive-

enhancing benefits those types of awards provide, is not just the best means of incentivizing objector counsel to invest in presenting valuable objections, it may actually help to inoculate the class-action process from the contagion of extortionate objecting.

CONCLUSION

The Court should vacate the district court's award of fees to the *Faneca* objectors.

Respectfully submitted,

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This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure because this brief contains 5,899 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

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/s/ J. Carl Cecere

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Pursuant to Third Circuit Local Rule 28.3(d), I certify that I am a member of the Bar of this Court.

/s/ J. Carl Cecere

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/s/ J. Carl Cecere

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I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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